

MICHAEL J. GEARIN (admitted *pro hac vice*)  
michael.gearin@klgates.com  
MICHAEL B. LUBIC (SBN 122591)  
michael.lubic@klgates.com  
MICHAEL K. RYAN (admitted *pro hac vice*)  
michael.ryan@klgates.com

Members of **K&L GATES LLP**  
10100 Santa Monica Boulevard, Seventh  
Floor  
Los Angeles, California 90067  
Telephone: 310.552.5000  
Facsimile: 310.552.5001

Attorneys for California Public  
Employees' Retirement System

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

In re

CITY OF SAN BERNARDINO,  
CALIFORNIA,

Debtor.

CITY OF SAN BERNARDINO,  
CALIFORNIA,

Plaintiff-Appellee,

v.

STATE OF CALIFORNIA; JOHN  
CHIANG, in his official capacity as State  
Controller of the State of California;  
OFFICE OF THE STATE  
CONTROLLER OF CALIFORNIA;  
MICHAEL COHEN, in his official  
capacity as the Director of the State of  
California Department of Finance;  
CALIFORNIA DEPARTMENT OF  
FINANCE,

Defendants-Appellants

Case No. 5:13-cv-01797-SJO

CALPERS' MOTION FOR LEAVE TO  
FILE BRIEF *AMICUS CURIAE* IN  
SUPPORT OF DEFENDANTS'  
APPEAL

Assigned to Hon. S. James Otero

1 The California Public Employees' Retirement System ("CalPERS"), by and  
2 through its undersigned attorneys, hereby moves this Court for leave to file the  
3 attached brief as *amicus curiae*. The proposed brief is attached as Exhibit A.

4 CalPERS is an arm of the State of California, which implements and administers  
5 the State's public employee retirement program—an aspect of the State's sovereignty.  
6 CalPERS should be granted leave to file its brief because this appeal addresses issues  
7 that are important to CalPERS and its approximate 1.7 million members. More  
8 specifically, it addresses whether a municipality, which is a creature of the State, can  
9 hale a State Agency into federal court against its will and then ask that court to require  
10 a State Agency to turnover funds to a non-party debtor that such non-party debtor  
11 never possessed. The Supreme Court has been express in its view that "the States'  
12 immunity from suit is a fundamental aspect" of State sovereignty. *Alden v. Maine*, 527  
13 U.S. 706, 713 (1999). In addition, this is the very first case that CalPERS is aware of  
14 that asks a court to apply the Supreme Court's decision in *Central Virginia Community*  
15 *College v. Katz*, 546 U.S. 356 (2006), to a municipal bankruptcy filed under chapter 9  
16 of the Bankruptcy Code. Also, this appeal implicates issues relating to the degree of  
17 control the State Agencies of California, like CalPERS, exercise over one of the State's  
18 municipalities which seeks the protection of the bankruptcy court. These issues are of  
19 significant importance to CalPERS, which acts to ensure the rights of its members and  
20 retirees for numerous municipalities across the State. Additionally, leave should be  
21 granted because the participation of CalPERS will not prejudice any party and may be  
22 of assistance to the Court. Due to the importance of the sovereign immunity and  
23 sovereignty issues, CalPERS' Board has authorized the filing of this *amicus curiae*  
24 brief.

25 An individual or organization seeking leave to appear as *amicus curiae* need not  
26 establish strict prerequisites. Rather, the court has broad discretion to permit *amicus*  
27 participation and the applicant need only show "that his participation is useful to or  
28 otherwise desirable to the court." *Congregation Etz Chaim v. City of Los Angeles*,

2009 WL 1293257, at \*5 n.4 (C.D. Cal. May 5, 2009) (quoting *Infinion Techs. N. Am. Corp. v. Mosaid Techs., Inc.*, 2006 U.S. Dist. LEXIS 81506, 2006 WL 3050849 (N.D. Cal. 2006)). “District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (quotation omitted).

In bankruptcy appeals to district courts, district courts have applied Rule 29 of the Federal Rules of Appellate Procedure by analogy to determine the procedures to be followed by parties filing amicus briefs. *See Triad Int’l Maint. Corp. v. Southern Air Transp., Inc.*, No. 2:04-CV-1200, 2005 WL 1917512, at \*1 (S.D. Ohio Aug. 10, 2005); *In re Dow Corning Corp.*, 255 B.R. 445, 446 (E.D. Mich. 2000).

It is of importance to CalPERS that the bankruptcy court’s misapplication of the United States Supreme Court’s decision in *Katz* and its erroneous views regarding the Tenth Amendment are reversed. In 1945, the City of San Bernardino elected to participate in the California State Retirement System, subject to the provisions of the State Employees’ Retirement Act. The City’s obligations are defined by the Public Employees’ Retirement Law (the “PERL”), Cal. Gov. Code § 20000 *et. seq.* Article XVI, section 17 of the California Constitution mandates that the CalPERS Board of Administration ensure the rights of CalPERS members and retirees to their full earned benefits. *City of Oakland v. Pub. Emps. Ret. Sys.*, 95 Cal. App. 4th 29, 39 (2002). Thus, CalPERS, like its sister agencies involved in this appeal, performs essential sovereign functions that are prescribed by law. *See* Cal. Gov. Code § 20002 (CalPERS “is a unit of the State and Consumer Service Agency”); *Feinstein v. Lewis*, 477 F. Supp. 1256, 1261 (S.D.N.Y. 1979) (quoting ERISA’s legislative history noting issues relating to state pensions are “are questions of state and local sovereignty [in which] the Federal Government should not interfere.”), *aff’d* 622 F.2d 573 (2d Cir. 1980);

1 *Arya v. CalPERS*, -- F. Supp.2d --, 2013 WL 1858422, at \*8 (E.D. Cal. May 2, 2013)  
 2 (finding CalPERS enjoys sovereign immunity).

3 The effect of this Court's ruling is not limited to the City of San Bernardino. It  
 4 establishes precedent in an unsettled area of law that may be applied to other chapter 9  
 5 cases in this State and across the nation. For this reason, CalPERS filed a brief as  
 6 *amicus curiae* that was considered by the bankruptcy court in connection with the  
 7 decision from which the Defendants are now appealing. *See* ER 217-83. As described  
 8 in CalPERS' proposed *amicus* brief, it is imperative that state agencies, like CalPERS,  
 9 be immune from suit in order for chapter 9 to function as Congress intended.  
 10 CalPERS submits that its proposed brief raises important issues and presents a unique  
 11 perspective, both of which will assist the Court in deciding this appeal.

12 For the foregoing reasons, CalPERS requests that this Court grant CalPERS  
 13 leave to file the accompanying brief in support of Defendants-Appellants. In addition,  
 14 to the extent this Court would find it helpful, CalPERS respectfully requests an  
 15 opportunity to participate in oral argument on appeal. *See* Fed. R. App. P. 29(g).

16 The undersigned counsel certifies that no other party's counsel authored the  
 17 attached *amicus curiae* brief in whole or in part, no other party or party's counsel  
 18 contributed money intended to fund this brief, and no other person contributed money  
 19 that was intended to fund the preparing or submitting of this brief. *See* Fed. R. App. P.  
 20 29(c)(5)(A)-(C).

21 Respectfully submitted,

22 Michael J. Gearin (pro hac vice)  
 23 Michael B. Lubic  
 24 Michael K. Ryan (pro hac vice)  
 25 K&L GATES LLP

26 Dated: October 31, 2013

27 By: /s/ Michael B. Lubic

28 Michael B. Lubic  
 Attorneys for California Public  
 Employees' Retirement System

**PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is K&L GATES LLP, 10100 Santa Monica Boulevard, 7th Floor, Los Angeles, California 90067.

On October 31, 2013, I served the foregoing document(s) described as follows:

**CALPERS' MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN  
SUPPORT OF DEFENDANTS' APPEAL**

☒ Via the CM/ECF system of the United States District Court, Central District of California.

☒ **BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California 90067, addressed as set forth below.

James F. Penman  
Don A. DiMichele  
Jolena E. Grider  
Office of the City Attorney  
300 North D Street, 6th Floor  
San Bernardino, CA 92418

☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 31, 2013, at Los Angeles, California.



Jonathan Randolph